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The Innominate Exception to the Hearsay Rule in Massachusetts: A Post-Mortem

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THE "INNOMINATE" EXCEPTION TO THE HEARSAY RULE IN MASSACHUSETTS: A POST-MORTEM

I. INTRODUCTION

Hearsay, an out of court statement offered to prove the truth of the matter asserted, is generally inadmissible in both Federal and Massachusetts courts. Both court systems, however, recognize many discrete, categorical exceptions to this exclusionary rule. For a hearsay statement to fall under one of these categorical exceptions it must comply with a strict set of factual characteristics. In addition to these exceptions, the Federal courts also recognize a "catch-all" exception to the rule against hearsay. For a hearsay statement to fall within the catch-all exception, it need not possess the factual characteristics required by the categorical exceptions, it merely must be trustworthy and necessary. Massachusetts, in a departure from the federal practice, has emphatically rejected the catch-all (or "innominate") exception.

This Article will investigate the history and rationale of the catch-all exception, in both the Federal Rules and Massachusetts case law. It will touch upon the criticism of the Federal version of the catch-all exception and the impact of this criticism upon the development of the Massachusetts rules of evidence. The Article will conclude by arguing that the Massachusetts Supreme Judicial Court has never fully grappled with the reasoning of the catch-all exception and has not adequately explained its decision to reject it.

II. HEARSAY

The rule excluding hearsay is considered fundamental to our legal system.[1] Hearsay is an out of court statement offered in evidence to prove the truth of the matter asserted in the statement.[2] Hearsay is generally inadmissible in both Federal courts and Massachusetts courts.[3]

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[1] JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364(II)(9) (James H. Chadbourn ed., rev. ed. 1974).

[2] The Federal definition is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c); in Massachusetts hearsay has been defined as "an extrajudicial statement offered to prove the truth of the matter asserted." Commonwealth v. Keizer, 385 N.E.2d 1001, 1004 n.4 (Mass. 1979).

[3] FED. R. EVID. 802.; *e.g.*, Commonwealth v. $14,200, 638 N.E.2d 45, 47 (Mass. App. Ct., 1994); Commonwealth v. Adamides, 639 N.E.2d 1092, 1094 (Mass. App. Ct. 1994); Adoption of Kenneth, 580 N.E.2d 392, 393 (Mass. App. Ct. 1991).

The rule against hearsay reflects the importance that Anglo-American law has placed on subjecting a witness to cross-examination. Cross examination has traditionally been seen as the most effective method of evaluating a witness' sincerity, perception, memory, and of reducing ambiguity of that witness' testimony.[4] Since a hearsay declarant is not subject to cross-examination at the time a hearsay statement is made, the trier of fact cannot properly assess the assertion for its trustworthiness.[5] This lack of trustworthiness renders hearsay statements inadmissible.

III. CATEGORICAL EXCEPTIONS TO HEARSAY

The common law has long recognized that hearsay statements may acquire indicia of reliability as a result of the factual contexts in which they are made. Hearsay statements with these indicia are considered by the courts to be trustworthy, and therefore admissible, without need of cross examination of the hearsay declarant.[6] For example, underlying the "excited utterance" exception to the hearsay rule is the belief that startling events cause a state of excitement such that the declarant is unlikely to have the composure required to concoct a lie. Statements made during this excited state are considered free from the hearsay risk of insincerity and are therefore considered to be trustworthy without cross examination.[7]

Common law courts and practitioners have assembled these factual contexts or circumstances into lists of discrete or "pigeonhole" exceptions to the hearsay rule.[8] Each exception has its own name and set of requirements. Any hearsay which did not fall within one of the recognized exceptions was per se inadmissible. Under the Federal Rules of Evidence, these exceptions are codified and enumerated under Rules 803 and 804.[9] Massachusetts,

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[4] Sincerity, perception, memory, and ambiguity are known as the four "testimonial infirmities" or hearsay risks. Laurence Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-61 (1974).

[5] FED. R. EVID. art. 8 advisory committee's note.

[6] FED. R. EVID. 803 advisory committee's note.

[7] FED. R. EVID. 803(2). The statement must relate to the source of the startling event. *Id.*

[8] For the first use of the term "pigeonhole" in Massachusetts, see Commonwealth v. Sampson, 388 N.E.2d 1214, 1219 (Mass. App. Ct. 1979).

[9] FED. R. EVID. 803 and 804. *See* FED. R. EVID. 803 advisory committee's note ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.").

which has not codified its rules of evidence, does recognize numerous discrete exceptions to the hearsay rule.[10]

IV. THE COMMON LAW DEVELOPMENT OF CATCH-ALL

A small handful of courts eventually began excepting certain hearsay statements from the operation of the hearsay rule on a case by case basis, without creating new and discrete "pigeonhole" exceptions.[11] These courts employed the rationale underlying the categorical exceptions, which is that some hearsay statements are trustworthy because of the context in which they are made. These courts simply began asking whether a hearsay statement possesses the core requirement of all the discrete exceptions to the hearsay rule: trustworthiness.

The most famous of these cases is *Dallas County v. Commercial Union Assurance Co.*[12] In *Dallas*, the Fifth Circuit determined that if hearsay evidence bears sufficient circumstantial guarantees of trustworthiness and is necessary, it can be excepted from the hearsay rule, despite its failure to fit within one of the recognized hearsay exceptions and without the need for the court to create a new exception.[13] In *Dallas*, an Alabama county attempted

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[10] PAUL J. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE § 8 (Mark S. Brodin & Michael Avery eds., 6th ed. 1994).

[11] United States v. Brown, 411 F.2d 1134, 1138 (10th Cir. 1969) (admitting hearsay which did not fall within recognized exception because not "subject to the basic dangers that premise the exclusion of hearsay."); United States v. Kearney, 420 F.2d 170, 175 (D.C. Cir. 1969) (admitting hearsay statement which failed to fall squarely within the excited utterance or dying declaration exceptions because the hearsay was "made under circumstances that conform to the general policies underlying the exceptions to the hearsay rule"); United States v. Castellana, 349 F.2d 264, 276 (2nd Cir. 1965) (admitting hearsay which fell within a recognized exception, but stating in dictum, "[w]e are loath to reduce the corpus of hearsay rules to a straight-jacketing, hypertechnical body of semantical slogans to be mechanically invoked regardless of the reliability of the proffered evidence."); Merriam Co. v. Syndicate Pub. Co., 207 F. 515, 518 (2nd Cir. 1913) (L. Hand, J.) (admitting hearsay statement which fell outside established exceptions "upon principle" because it "fulfill[ed] both the requisites of an exception to the hearsay rule, necessity and circumstantial guarantee of trustworthiness." (citing WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1421, 1422, 1690)); United States v. Barbati, 284 F. Supp. 409, 413 (E.D.N.Y. 1968) (admitting hearsay evidence on "general principle"); Perry v. Parker, 141 A.2d 883, 884 (N.H. 1958) (stating, "[t]he fundamental inquiry is not the name or number of the exceptions to the hearsay rule but whether 'under the circumstances [the evidence] satisfies the reasons which lie *behind* the exceptions.'" (alteration in original) (quoting MCCORMICK, EVIDENCE 633 (1954))); Gagnon v. Pronovost, 92 A.2d 904, 906 (N.H. 1952) (admitting hearsay not admissible under any recognized exception to the hearsay rule because facts suggested "apparent trustworthiness").

[12] 286 F.2d 388 (5th Cir. 1961).

[13] *Id.* at 397.

to collect fire insurance payments for a collapsed county clock tower which the county claimed had been damaged by lightning.[14] The county produced evidence of the lightning damage which included charred timber.[15] The insurer refused to pay, claiming that the tower fell because of construction defects.[16] To support its case and account for the charred timber, the insurance company introduced a fifty-eight year-old newspaper article which reported that the tower was damaged by fire during its construction.[17] The evidence was admitted at trial and a verdict was returned in favor of the insurance company.[18] Dallas County appealed, but the admission of the newspaper article was upheld.[19]

The Fifth Circuit observed that the core requirements of all hearsay exceptions are necessity and trustworthiness.[20] The newspaper article was admitted after the court found that it was necessary because it was the only evidence supporting the insurer's case in chief.[21] The court deemed it trustworthy because the author had no motive to lie and an untruthful account of the fire would have subjected the newspaper to ridicule.[22] The court concluded, "[w]e do not characterize this newspaper as a 'business record', nor as an 'ancient document', nor as any other readily identifiable and happily tagged species of hearsay exception. It is admissible because it is necessary and trustworthy."[23]

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[14] *Id.* at 390.

[15] *Id.*

[16] 286 F.2d at 390.

[17] *Id.* at 391.

[18] *Id.*

[19] *Id.* at 390.

[20] 286 F.2d at 396. The court, following Wigmore, identified three circumstances where hearsay statements possess trustworthiness independent of cross-examination:

> Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed; where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force; where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

Id. at 397 (quoting 5 WIGMORE, EVIDENCE, § 1422 (3rd ed.)).

[21] 286 F.2d at 396-397.

[22] *Id.*

[23] *Id.* at 397-398.

In so ruling, the court extended the underlying rationale of the various discrete hearsay exceptions without using the exceptions themselves.[24] This case, and others like it, pronounced a standard for the admission of hearsay based solely on the criteria of necessity and trustworthiness.

V. FEDERAL RULES CODIFICATION OF CATCH-ALL

Dallas had profound ramifications for the formulation of the hearsay exceptions contained in the Federal Rules of Evidence. In 1975, Congress promulgated the Federal Rules of Evidence. Prior to the adoption of the rules, there was fierce debate over including the catch-all exception as part of the rules themselves.[25] Opponents argued that such exceptions would destroy the rule against hearsay.[26] Proponents feared that the exclusion of the catch-all exception would have a stultifying effect on the development of the law of evidence, and would forever limit the hearsay exceptions to those listed in the rules.[27] After extensive debate, the proponents successfully introduced and adopted 803(24) and 804(b)5.[28] Rule 803(24) excepts hearsay statements which are not covered by other enumerated exceptions, but which have "equivalent circumstantial guarantees of trustworthiness."[29] The hearsay evidence must also be the most probative evidence on point, and be ma-

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[24] *Id.* at 395-397.

[25] *See* H.R. REP. NO. 650, 93d Cong., 1st Sess. 5 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7079; S.REP. NO. 1277, 93d Cong., 2d Sess. 18 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7065; Conf. Rep. No. 1597, 93d Cong., 2d Sess. 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7105.

[26] Jo Ann Harris, *Catch (24): Residual Hearsay*, LITIG., Fall 1985 at 10, 11.

[27] *Id.*

[28] *Id.* The distinction between 803(24) and 804(b)(5) is that 804(b)(5) applies only when the declarant is unavailable. The text and underlying logic of both are the same, and this article will not treat them separately.

[29] FED. R. EVID. 803(24) states in full:

> Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness [is admissible], if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

terial.[30] In addition, any party which plans to use a statement under 803(24) must give advance notice of such plan to the adverse party.[31]

In the official comment to Rule 803(24), the Rules Committee advanced the belief that the catch-all exception was needed to keep the rules from stagnating.[32] Yet the committee cited *Dallas* to support the adoption of the catch-all exception.[33] The rationale behind *Dallas* is not that the catch-all exception is needed to prevent stagnation, but rather that the exception offers the court a flexible and sensible method of handling hearsay statements which do not fall under any of the recognized categorical exceptions to the hearsay rule.

VI. INITIAL REACTION TO CATCH-ALL IN MASSACHUSETTS

The federal codification of the catch-all exception to the rule against hearsay seems to have influenced Massachusetts practitioners. The first case with any mention of the catch-all exception—referred to as the "innominate" exception in Massachusetts[34]—appears in the same year as the promulgation of the Federal Rules and cites to the Federal Rules.[35] In this case, *Commonwealth v. White*,[36] the defendant was charged with armed robbery, assault and battery with a dangerous weapon, and unlawful possession of a narcotic.[37] The Commonwealth introduced a hearsay statement by an alleged co-conspirator which implicated the defendant.[38] The trial court admitted the hearsay statement under an exception for assertions made by a co-conspirator.[39]

On appeal, the Supreme Judicial Court (SJC) ruled that the co-conspirator rule did not apply because the statement was not made during

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[30] *Id.* "[T]he statement [must be] more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." *Id.*

[31] *Id.*

[32] FED. R. EVID. 803(24) advisory committee's note. The committee explained "[i]t would . . . . be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been cataloged and to pass the hearsay rule to oncoming generations as a closed system." *Id.*

[33] *Id.*

[34] "Innominate" is defined as "not named or classed; belonging to no specific class." BLACK'S LAW DICTIONARY 789 (6th ed. 1990).

[35] Commonwealth v. White, 352 N.E.2d 904 (Mass. 1976).

[36] *Id.*

[37] *Id.* at 906.

[38] *Id.* at 907.

[39] 352 N.E.2d at 907.

the pendency and furtherance of a conspiracy.[40] During appellate argument, the Commonwealth urged the court to recognize an "innominate exception" similar to Federal Rule 803(24), and admit the evidence.[41] The court, however, declined to recognize the innominate exception in this case because the hearsay statement was untrustworthy (the declarant, an alleged co-conspirator, had a motive to lie), and it was not necessary to the Commonwealth's case (the Commonwealth had no explanation for its failure to produce the hearsay declarant at trial).[42]

In essence, the court rejected the Commonwealth's use of the innominate exception because the facts of the case did not fit the Federal Rules formulation of the exception. Indeed, the Supreme Judicial Court virtually accepted the innominate exception when it stated, "[w]e agree that the hearsay rule and its stated exceptions should not be regarded as a closed system without room for variations in particular cases on reasoned grounds."[43]

The *White* approach was followed in the 1980 case of *Commonwealth v. Meech*.[44] In *Meech*, the defendant was convicted of first degree murder and assault and battery with a dangerous weapon.[45] At the trial, the defendant—who did not deny that he killed the victim—offered the grand jury testimony of an acquaintance that shortly after the killing the defendant had threatened the acquaintance with a knife but then made amorous advances toward him.[46] This evidence of his disturbed mental state, the defendant argued, would have proven that the he lacked the *mens rea* necessary for conviction of first degree murder.[47] The defendant attempted to have the statement admitted under the prior recorded testimony exception to the hearsay rule, but the trial court refused to admit it.[48] The defendant was convicted.[49]

On appeal, the SJC echoed the words of *White* by declaring that the Massachusetts rules of evidence are flexible: "we do not regard the common

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[40] *Id.* at 911.

[41] *Id.* The Commonwealth argued that such admission would "be in a large sense compatible with sundry recognized hearsay exceptions, and would otherwise be fair." *Id.*

[42] *Id.*

[43] 352 N.E.2d at 911.

[44] 403 N.E.2d 1174 (Mass. 1980).

[45] *Id.* at 1176.

[46] *Id.* at 1177.

[47] *Id.*

[48] 403 N.E.2d at 1177.

[49] *Id.* at 1176.

law hearsay exceptions as frozen in their established contours, and have been prepared on suitable occasions to venture forth [to establish new exceptions]."[50] Despite this language, the court rejected the defendant's argument because the catch-all exception was not argued before the trial judge.[51] In addition, the court added that, as in *White*, the facts of the case did not fit the requirements of the federal formulation of the catch-all exception because of the statement's lack of trustworthiness and because there was more probative evidence than the hearsay.[52] The court also noted that the matter was under consideration by the Proposed Rules of Massachusetts Evidence Committee.[53]

In neither *White* nor *Meech* was the court hostile to the innominate exception. Instead, the SJC seemed to be waiting for the appropriate facts to present themselves before the court would be willing to adopt the Federal Rules formulation of the catch-all exception. After *White* and *Meech* were decided, however, the Federal catch-all exception became the subject of severe criticism.[54] This criticism had a profound effect on the Proposed Massachusetts Rules of Evidence Committee's view of the catch-all exception which, in turn, shaped the future of the SJC's outlook toward the exception.

VII. CRITICISM OF THE FEDERAL CATCH-ALL PROVISIONS

Federal courts began grappling with the implications of the catch-all exception almost immediately after the rules were promulgated in 1976. Legal commentators were distressed with the results.[55] The criticism of the catch-all exception focused less on the theory underlying catch-all and more on the way the rules have been applied by the courts. In general, legal observers noted that the rules were being misread and misapplied, resulting in a flood of incorrectly admitted hearsay.[56]

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[50] *Id.* at 1179.

[51] *Id.*

[52] 403 N.E.2d at 1179 n.12.

[53] *Id.*

[54] *See* discussion *infra* part VII.

[55] *E.g.*, James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 FLA. ST. U. L. REV. 787 (1993); Joseph W. Rand, Note, *The Residual Exceptions to the Federal Hearsay Rule: the Futile and Misguided Attempt to Restrain Judicial Discretion*, 80 GEO. L.J. 873 (1992); David A. Soneshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867 (1982).

[56] *See* Beaver, *supra* note 55, at 819 (arguing that the standards are too vague); Harris, *supra* note 27, at 11 (stating that busy district court judges do not have time to articulate reasons for their evidentiary decisions and are merely paying lip service to the

The catch-all requires that the hearsay have "circumstantial guarantees of trustworthiness,"[57] but commentators observed that many courts have mistakenly found this trustworthiness by analyzing factors extrinsic to the evidence itself, such as the availability of another witness to corroborate the hearsay declaration.[58] The Federal courts have also admitted "near misses," hearsay which almost fits the requirements of an enumerated exception to the hearsay rule but which is brought in under the catch-all provision.[59] Commentators and a few courts complain that the admission of these near misses eviscerates the enumerated exceptions.[60] Under Rule 803(24) the hearsay must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."[61] Courts have found this requirement satisfied in cases where the hearsay simply helps the jury decide the factual issues of the case.[62] The practical effect of this loose standard is to admit cumulative evidence.[63] The notice requirement is ignored, which results in surprise and disadvantage of opposing counsel.[64] Overall, the criticisms of the commentators are more focused on the application of the catch-all exception than at the concept of catch-all.

VIII. REJECTION OF CATCH-ALL IN PROPOSED MASSACHUSETTS RULES OF EVIDENCE

Criticism of the federal catch-all exception coincided with the formulation of the Proposed Massachusetts Rules of Evidence. In 1976, the Supreme Judicial Court appointed an Advisory Committee to consider

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rule); Rand, *supra* note 55, at 879 (arguing the catch-all exceptions are "poorly drafted and unrealistically stringent").

[57] FED. R. EVID. 803(24).

[58] *See* Soneshein, *supra* note 55, at 879.

[59] *See* Soneshein, *supra* note 55, at 885; Gary W. Majors, Comment, *Admitting 'Near Misses' Under the Residual Hearsay Exceptions*, 66 OR. L. REV. 599 (1987).

[60] *Id.*

[61] FED. R. EVID. 803(24).

[62] *See* Soneshein, *supra* note 55, at 890.

[63] *See id.* at 891.

[64] *See* Harris, *supra* note 27 at 12; *see* generally, Myrna S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 LOY. L.A. L. REV. 925 (1992); Lizbeth A. Turner, Comment, *Admission of Grand Jury Testimony Under the Residual Hearsay Exception*, 59 TUL. L. REV. 1033 (1985).

codification of the Massachusetts Rules of Evidence.[65] Four years later, the Advisory Committee submitted Proposed Massachusetts Rules of Evidence to the Court.[66] The proposed rules generally tracked the form and substance of the Federal Rules.[67] Ultimately, however, the Committee voted against adopting the federal catch-all exception.[68]

The Advisory Committee provided three reasons for refusing to adopt the catch-all exception to the hearsay rule. First, in an apparent reference to the criticism leveled by legal commentators, the Committee noted the controversial nature of the exception.[69] Secondly, many of the states which have adopted the Federal Rules of Evidence chose not to adopt the exceptions.[70] The third reason given was that the exception was unnecessary "[i]n view of the common law power of the courts to fashion new exceptions to the hearsay rule."[71] The committee concluded that recognition of the exception "may provoke more problems than it is intended to solve" and that "recognition of new exceptions is best left to case law development."[72]

IX. CURRENT MASSACHUSETTS ATTITUDE TOWARDS CATCH-ALL

The rejection of the innominate exception by the Advisory Committee signaled the exception's death knell in the Massachusetts courts. In cases

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[65] Supreme Judicial Court, Announcement Concerning The Proposed Massachusetts Rules of Evidence (SJC-2787, Dec. 30, 1982) [hereinafter SJC Announcement], *reprinted in* Kenneth B. Hughes, MASSACHUSETTS PRACTICE app. I at 508 (William G. Young et al. eds., Supp. 1992).

[66] *Id.*

[67] Robert J. Ambrogi, *SJC Carves Exception to Hearsay-Ban Rule*, MASS. LAW. WKLY., Aug. 24, 1992, at 1 (quoting advisory committee member Stephen N. Subrin: "Our operating assumption was that we would try to track the federal rules unless there was a Massachusetts case or statute saying otherwise.").

[68] Proposed Mass. R. Evid. 803(24) advisory committee's note. The Proposed Massachusetts Rules are reprinted in JOHN J. MCNAUGHT & J. HAROLD FLANNERY, MASSACHUSETTS EVIDENCE: A COURTROOM REFERENCE (1988 & Supp. 1992).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Proposed Mass. R. Evid. 803(24) advisory committee's note (citing Commonwealth v. Carr, 369 N.E.2d 970 (Mass. 1977) in which the SJC rejected the traditional common law distinction between a statement against pecuniary interest and a statement against penal interest.) On December 30, 1982, the Supreme Judicial Court announced that a majority of the justices did not favor adoption of the Proposed Rules, because it was felt that "promulgation of rules of evidence would tend to restrict the development of common law principles pertaining to the admissibility of evidence." SJC Announcement, *supra* note 65.

tried before the Proposed Rules were drafted (*White* and *Meech*), the SJC operated with an open mindedness about the exception, refusing to apply the exception only because the facts did not fit the Federal Rules formulation. After the Advisory Committee rejected catch-all, the courts no longer applied the facts of the cases to the Federal Rules; instead, they simply began to reject the exception.

This change is evident in the first case to consider the innominate exception after the Proposed Rules were formulated, *Commonwealth v. Pope*[73]. In *Pope*, a woman had shot her husband and then killed herself with a weapon supplied by the defendant.[74] The defendant was charged with being an accessory to murder in the first degree.[75] To convict the defendant the Commonwealth had to prove the woman had murdered her husband, which prosecutors did by introducing the woman's suicide note containing the hearsay statement "I killed [my husband]."[76] The court admitted the statement as a declaration against penal interest and the defendant was convicted.[77]

The defendant appealed admission of the suicide note, and the SJC ruled that the statement was improperly admitted under the exception for declarations against penal interest.[78] The Commonwealth responded that the innominate exception should apply.[79] The court flatly rejected the application of the innominate exception, stating that it could "see no reason to adopt the rather broad Federal formulation as a general rule."[80] The court adopted the Proposed Rules Committee position, stating that the federal formulation of catch-all "has been marked by conflicting and illogical results" and had been met with considerable disapprobation by legal commentators.[81]

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[73] 491 N.E.2d 240 (Mass. 1986).

[74] *Id.* at 241-242.

[75] *Id.* at 241.

[76] *Id.* at 242.

[77] 491 N.E.2d at 241.

[78] *Id.* at 243. The court reasoned that because the note was written by a person about to commit suicide, it could not be said to have subjected the declarant to the possibility of criminal liability, and thus did not possess the requisite indicia of reliability—sincerity—for this exception.

[79] *Id.* at 244.

[80] *Id.*

[81] *Id.* at 244 (citing Soneshein, *supra* note 55 and Harris, *supra* note 27.)

Pope is a radical departure from the court's previous attitude towards the catch-all exception. In *White* and *Meech* the court seemed willing to recognize the innominate exception should the appropriate facts present themselves. Conversely, in *Pope* the court for the first time expressed dissatisfaction with the rule.[82]

The decision in *Pope* signaled the demise of the innominate exception to the hearsay rule in Massachusetts. Since *Pope*, the exception has been argued three times before the Massachusetts Courts of Appeal and rejected each time.[83] In 1992 the SJC again rejected the exception in *Commonwealth v. Costello*.[84]

X. ARGUMENT

In rejecting the innominate exception, the Massachusetts courts focused too closely on criticism of the Federal Rules formulation, and failed to thoroughly analyze the rationale underlying catch-all and to acknowledge its common law pedigree.

The catch-all exception developed in case law prior to the codification of the Federal Rules of Evidence. A number of common law courts determined that despite the power of judges to formulate new categorical exceptions to the hearsay rule, no list of exceptions could ever encompass the full range of trustworthy hearsay evidence which might be introduced at trial. While the use of categorical exceptions would still be useful, some trustworthy hearsay had to be excepted on a case by case basis.

The assertion, therefore, by the Advisory Committee and the SJC that the innominate exception is unnecessary because of the common law power of Massachusetts courts to fashion new exceptions to the hearsay rule

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[82] 491 N.E.2d at 244.

[83] Commonwealth v. $14,200, 638 N.E.2d 45, 47 n.3 (Mass. App. Ct. 1994) ("It should be noted . . . that Massachusetts courts do not recognize the innominate exception to the hearsay rule as does Fed.R.Evid. 802(24)." (citing Commonwealth v. Costello, 582 N.E.2d 938 (Mass. 1991))); Simmons v. Yurchak, 551 N.E.2d 539, 542 (Mass. App. Ct. 1990) (describing the innominate exception as "an exception prominently absent from the proposed Massachusetts rules."); In re Custody of Jennifer, 517 N.E.2d 187, 190 (Mass. App. Ct. 1988) (citing Proposed Mass. R. Evid. 803(24) advisory committee's note and observing that they "specifically rejected the innominate exception provision found in Fed.R.Evid. 803(24).").

[84] Commonwealth v. Costello, 582 N.E.2d 938, 942 (Mass. 1991) (stating that the SJC does not "recognize the innominate exception to the hearsay rule," and comparing case *sub judice* with United States v. Shaw, 824 F.2d 601, 609 (8th Cir.1987), cert. denied, 484 U.S. 1068, 108 S. Ct. 1033, 98 L.Ed.2d 997 (1988), where similar hearsay was found to be admissible under 803(24)).

misses the point. This assertion is, in fact, belied by the common law parentage of the catch-all exception.

In any case, the criticism of the Federal catch-all provisions were leveled at their wording and the application, not their underlying rationale, and not their common law heritage. But it is this criticism of the application of the Federal Rules which forms the basis of the Advisory Committee's rejection of catch-all. And it is the Advisory Committee's rejection of catch-all which is the basis of the rejection of the rule by the SJC. In what might be called judicial non-feasance, the Massachusetts courts have never grappled with the underlying rationale or history of the catch-all exception and have, instead, allowed the rules committee to decide the issue for them.

XI. CONCLUSION

In the years before the Advisory Committee on the proposed rules of evidence offered their recommendations, the SJC of Massachusetts expressed an open minded approach towards recognizing an innominate exception to the hearsay rule. This exception, developed in state and Federal case law and recognized under the Federal Rules of Evidence, permits admission of hearsay on the basis of its inherent trustworthiness and necessity, even though it may fall outside the commonly accepted discrete categories of hearsay exceptions.

After the proposed rules rejected the innominate exception, the Massachusetts courts changed their outlook from one of open mindedness to one of flat rejection of the exception. The courts, taking their cue from the Advisory Committee, based their decision on criticism of the wording and implementation of the Federal catch-all rules, while ignoring its common law heritage and failing to grapple with the rationale of the exception. In light of renewed calls for the codification of Massachusetts evidence rules[85] and

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[85] *See* Editorial, *A Code of Evidence*, MASS. LAW. WKLY., Sep. 7, 1992, at 10. The editorial argues:

> Absence of codified rules of evidence leads to confusion and disharmony among trial lawyers and judges . . . [c]odification of these rules will enhance uniformity of practice within the state courts and promote uniformity between state and federal practice. Codification will also reduce the time spent by lawyers and judges researching and litigating evidentiary questions. By enhancing uniformity and reducing litigation, codification will ultimately improve the delivery of justice in this state.

Id.

continued pressure on the courts to admit certain kinds of compelling hearsay, it remains to be seen whether this commitment to discrete categories of hearsay exceptions will last.

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